No. 2530

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHAS. B. BLESSING, as Trustee of the Estate of Pacific Motor Car Company (a corporation), Bankrupt,

Petitioner,

vs.

G. A. BLANCHARD and W. H. WINN,

Respondents.

BRIEF FOR RESPONDENTS.

R. H. COUNTRYMAN,
Attorney for Respondents.

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Statement of the Case.

The bankrupt, Pacific Motor Car Company, was a California corporation engaged in distributing, for a commission, the "Cole" car in local territory.

"The capital stock of this corporation is owned by one individual" (p. 9 Petition for Revision). The bankrupt had the usual salesmen and a service shop. Respondent Blanchard was a city salesman for said bankrupt. The corporation was in financial trouble, and Blanchard, about three months before the petition in bankruptcy was filed, was given the position of general manager, but he continued to work "in the capacity of a salesman" (page 7 of said Petition).

He "was subject to the control in all things" of the sole owner of the capital stock of the bankrupt (page 9 of said Petition).

"He (Blanchard) had no voice in the policies of the company, not being a stockholder, officer or director thereof" (page 9 of said Petition).

He had no "financial or controlling interest in the business, he being only a salaried employee" (page 10 of said Petition).

"He was not an officer, director or stockholder of the bankrupt and received no compensation other than a salary" (page 7 of said Petition).

Respondent Winn "performed labor about the shop in like manner as the men working under him in the repair of automobiles and general shop work" (page 7 of said Petition).

"As to Winn, while he had charge of the workmen in his department, he worked along with them, performing manual labor as a mechanic" (page 11 of said Petition).

Brief of the Argument.

I.

SECTION 1 (27) OF THE BANKRUPTCY ACT DEFINING A WAGE-EARNER DOES NOT LIMIT OR CONTROL SECTION 64-b (4) OF SAID BANKRUPTCY ACT.

Remington on Bankruptcy, page 1338, Sec. 2171;

In re Scanlon Co., 3 A. B. R. 202;

In re Carolina Cooperage Co., 3 A. B. R. 154;
In re Gurewitz, 10 A. B. R. 350;
In re Smith, 11 A. B. R. 647;
First Nat. Bk. of Wilkes Barre v. Barnum, 20 A. B. R. 439;
In re Swain Co., 28 A. B. R. 66.

Words + Phrases Title "Salary"
Words + Phrases Title "Wages"
White v Hayden 126 Cal. 627.

II.

BLANCHARD AND WINN WERE BOTH WORKMEN AND SERVANTS.

Robuck Weather Strip & Wire Screen Co., 24 A. B. R. 532;
In re Swain Co., 28 A. B. R. 66;
In re Roberts, 27 A. B. R. 437;
In re Coldwell, 21 A. B. R. 236;
Bell v. Arledge, 27 A. B. R. 773;
In re Baumblatt, 19 A. B. R. 500;
In re Fink, 20 A. B. R. 897;
Am. & Eng. Ency. of Law, 2nd ed., p. 11;
Collier on Bankruptcy, 7th ed. 740.

Black on Bankr. secs 105, 495, 626, 627, 628.
Collier on Bankr. 10th ed. p 14, 18, 127, 401, 902.
Remington on Bankr. secs 30, 46, 47, 101½, 243.
171 to 218

III.

BLANCHARD WAS A CITY SALESMAN AND A CLERK.

Sec. 64-b (4) of the Bankruptcy Act, by an amendment approved June 15th, 1906 (Vol. 34 U. S. Sts. at Large 267; Vol. 3 Foster's Fed. Prac. p. 3027) was amended by inserting therein the words "travel-

ing or city salesman". The language of said section as amended reads as follows, viz.:

> "Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed $300 to each claimant."

This amendment is a congressional declaration that the original section was being too narrowly construed by the judges of several districts.

In re New England Thread Co., 20 A. B. R. 47.

IV.

BLANCHARD AND WINN ARE ENTITLED TO PRIORITY UNDER THE LAW OF CALIFORNIA.

Sec. 1204 of the California Code of Civil Procedure reads as follows, viz:

> "When an assignment, whether voluntary or involuntary, is made for the benefit of the creditors of the assignor, or results from any proceeding in insolvency commenced against him, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers and other persons, for services rendered for him within sixty days prior to such assignment, or to the commencement of such proceeding, and not exceeding one hundred dollars each, constitute preferred claims, and must be paid by the trustee or assignee before the claim of any other creditor of the assignor or insolvent."

Sec. 1205 of the California Code of Civil Procedure reads as follows, viz:

"Upon the death of any employer, the wages, not exceeding one hundred dollars in amount, of each minor, mechanic, salesman, clerk, servant, laborer or other employee, for work done or services rendered within sixty days prior to such death, must be paid before any other claim against the estate of such employer, except his funeral expenses, and expenses of the last sickness, the allowance to the widow and infant children, and the charges and expenses of administration."

Sec. 1206 of the California Code of Civil Procedure reads as follows, viz:

"Upon the levy of any attachment or execution, not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer, or other person who has performed work or rendered services for the defendant within sixty days prior to the levy, may file a verified statement of his claim therefor with the officer executing the writ, and give copies thereof to the debtor and the creditor, and such claim, not exceeding one hundred dollars, unless disputed, must be paid by such officer from the proceeds of such levy remaining in his hands at the filing of such statement. If any claim is disputed, within the time, and in the manner prescribed in section twelve hundred and seven, the claimant must within ten days thereafter commence an action for the recovery of his demand, which action must be prosecuted with due diligence, or his claim to priority of payment is forever barred. The officer must retain in his possession until the determination of such action so much of the proceeds of the writ as may be necessary to satisfy the claim, and if the claimant recovers judgment, the officer must pay the same, including the costs of suit, from such proceeds."

Sec. 1207 of the California Code of Civil Procedure reads as follows, viz:

> "Within five days after receiving a copy of the statement provided for in the preceding section, either the debtor or the creditor may file with the officer a verified statement denying that any part of such claim is due for services rendered within sixty days next preceding the levy of the writ, or denying that any part of such claim, beyond a sum specified, is so due. If a part of the claim is admitted to be due, and the claimant nevertheless brings suit and does not recover more than the amount so admitted, he cannot recover costs, but the costs must be adjudged against him, and the amount thereof deducted from the sum found due."

Sec. 1208 of the California C. C. P. reads as follows, viz:

> "If the claims presented under section twelve hundred and six and not disputed, or, if disputed, established by judgment, exceed the proceeds of the writ not disposed of before their presentation, such proceeds must be distributed among the claimants in proportion to the amount of their respective claims."

Bankruptcy Act, 64-b (5);

In Swain Co., 28 A. B. R. 66;

Ludlow v. Pugh, 32 A. B. R. 435;

In re Keith-Gara Co., 29 A. B. R. 466;

In re Joel J. Gerson, 1 A. B. R. 251;

In re Rouse, Hazard & Co., 1 A. B. R. 231;

(The case of In re Benj. L. Rouse, 1 A. B. R. 393, decides different propositions.)

In re Burton Bros. Mnfg. Co., 14 A. B. R. 218;

In re E. Wright, 2 A. B. R. 592;
In re Goldstein, 2 A. B. R. 603;
In re Fall City Co., 3 A. B. R. 437;
In re Lewis, 4 A. B. R. 51;
In re Lawlor, 6 A. B. R. 184;
In re William V. Crow, 7 A. B. R. 545;
In re Jones, 18 A. B. R. 206;
In re Standard Oak Veneer Co., 22 A. B. R. 883;
In re Mercer, 22 A. B. R. 413;
In re Amoratis, 24 A. B. R. 565;
In re Chandron & Peyton, 24 A. B. R. 811;
In re Yoke Vitrified Brick Co., 25 A. B. R. 18;
In re McDavid Lumber Co., 27 A. B. R. 39;
In re Tilden, 91 Fed. 500;
In re Camp, 91 Fed. 745;
In re Byrne, 97 Fed. 762;
Bank of Visalia v. Dillonwood Co., 148 Cal. 18.

Argument.

BLANCHARD AND WINN ARE NOT EXCLUDED FROM SEC. 64-b (4) OF THE BANKRUPTCY ACT BECAUSE THEIR COMPENSATION EXCEEDED THE SUM OF $1500 PER YEAR.

In his report herein the referee said:

"There is some authority in support of the contention that where the wages exceed $1500 a year, priority cannot be granted. In re Rose, 1 A. B. R. 73, and the recent case of In re

Becker & Company, opinion by the referee, 31 A. B. R. 596.

"The decided weight of authority, however, is that the provisions of section 1 (27) have reference to those who may be proceeded against in an involuntary proceeding, and is not controlling upon the question as to who is entitled to priority."

The weight of authority is clearly sustained by the well established rules of statutory construction. Section 1 (5) defines the word "clerk" as meaning the clerk of a Court of bankruptcy. If the narrow construction contended for by the petitioner is adopted, the word "clerk" in Section 64-b (4) would have to be confined to clerks of a Court of bankruptcy. Palpably such a construction would be unreasonable, and in clear violation of the purpose of Congress to grant priorities. Section 64 is headed "debts which have priority". It is subdivided and sectionized. The amendment of Section 64-b (4) of June 15th, 1906, shows the intention of Congress to enlarge the scope of the section, and not to restrict it, or to limit its operation. Because an individual who works for wages, salary or hire at a compensation not exceeding $1500 per year may not be adjudged an involuntary bankrupt, is no reason why each such wage-earner should not be entitled to compensation earned by him if his earnings are in excess of $1500 per year. In one section Congress declares its policy to be such that an individual who is unable to earn a sum in excess of $1500 a year shall not be proceeded against as an

involuntary bankrupt. In the other section, it announces its policy that each workman, clerk, traveling or city salesman, or servant, shall be entitled to the sum of $300 as a priority, if that sum of money shall have been earned by him within three months before the date of the commencement of proceedings in bankruptcy. There is no limit as to the yearly compensation that such prior claimant shall have been paid, but there is a limit that he shall not have priority for any unpaid amount in excess of the sum of $300. This priority rule is along the line of homestead and exemption laws, it being universally conceded that it is for the best interests of organized society that persons who depend on their labor for their living expenses should not be pauperized, and to protect subordinate helpers and assistants and those dependent upon their wages as a means of livelihood.

II.

NEITHER BLANCHARD NOR WINN WAS ANYTHING MORE THAN AN ORDINARY EMPLOYE OF THE BANKRUPT.

Blanchard acted as a salesman of the bankrupt. He was not a stockholder of the corporation. He was not a director or officer. He was the first employe to be discharged. He was hired and discharged the same as any other employe. While designated as general manager, it is apparent that in a small corporation engaged in retailing motor

cars in a limited territory, the title of general manager was mouth-filling in sound rather than in substance; the bankrupt apparently tried to cover its shortage in commissary by a lengthening of titles.

Winn is clearly a workman. He wore overalls and a jumper and performed manual mechanical labor the same as any other workman in the service shop. Duty and not nomenclature is the real test to be applied. The bankrupt was one man doing business under a corporate name. As a matter of convenience for the one stockholder, the business was conducted under the familiar and convenient form of corporate entity. The Court should look through the mere form to the end that the priority contemplated by the statute should be enforced. It is quite a common thing for close corporations to elect clerks and subordinates to directorship and to give them official titles, but it is the experience of all who transact business with such close corporations that the importance of the clerk or subordinate is not raised, nor is his salary increased, because he fills the position of a director, or is designated as an officer of such close corporation. When the owners of the capital stock of the corporation, whether one or more, become dissatisfied with the clerk or subordinate he is discharged as unceremoniously as he would have been if he never had been a dummy director or held an empty title.

In re Swain Co. v. 28 A. B. R. 66, the opinion was written by Mr. District Judge De Haven. The head-note reads:

> "The claim made by one who acted as director and secretary of the bankrupt restaurant corporation, but who was really a 'dummy' officer, for wages for services rendered as stewart of bankrupt's restaurant, and in no other capacity, is entitled to priority of payment under Section 64-b of the Bankruptcy Act."

In re Roberts, 27 A. B. R. 437, the claimant was a bookkeeper. While occupying the duties of a bookkeeper the claimant was elected as a director and treasurer of the bankrupt corporation. U. S. District Judge Willard held that the claimant was entitled to a preference for her monthly salary, saying:

> "The fact that a claimant is a director or officer of a corporation does not disable the corporation from employing him as a clerk also."

In re Pilger 118 Fed. 206.

PRIORITY GIVEN BY THE LAWS OF CALIFORNIA.

This matter is so well settled that it would be a work of supererogation to further consider it. Among the authorities we have cited is In re Amoratis, 24 A. B. R. 565, in which Mr. Circuit Judge Ross of this district wrote the opinion.

Dated, San Francisco,
March 6, 1915.

Respectfully submitted,

R. H. COUNTRYMAN,
Attorney for Respondents.